In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1021

JOHN ROSSELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a district court has power, more than three years after the entry in this Court of the order denying certiorari, to reduce a fine imposed in a criminal case.

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on December 2, 1968, on one count charging interstate transportation in aid of racketeering, three counts charging interstate trans-

portation of fraudently taken securities, one count charging conspiracy to commit the substantive offenses, and one count charging the filing of false statements, in violation of 18 U.S.C. 371, 1952 and 2314, and 26 U.S.C. 7206(1). He was sentenced to five years' imprisonment, fined $55,000, and ordered to "stand committed" until the fine was paid. On December 20, 1970, the court of appeals affirmed the convictions (432 F.2d 879). A petition for certiorari was denied, and the order denying certiorari was entered in this Court on February 22, 1971 (401 U.S. 924).

On June 28, 1971, petitioner filed a motion for a reduction of sentence. On October 18, 1971, the district court reduced the term of imprisonment to four years and ordered that it was "retaining jurisdiction" over the fine. Thereafter, petitioner moved for a reduction of the fine and the court vacated the "stand committed" order on March 6, 1973. One year later petitioner again moved for a reduction of the fine, and on March 25, 1974—over three years after denial of certiorari—the court reduced the fine to $10,000. The government then filed a petition for a writ of mandamus in the court of appeals seeking an order directing the district court to vacate its order of March 25, 1974, reducing the fine. On January 20, 1975, the court of appeals granted this request (509 F.2d 1352; Pet. App.), holding that petitioner's motion for reduction of sentence was not timely filed.

Rule 35, Fed. R. Crim. P., provides in relevant part that a court may reduce a sentence within 120 days "after entry of any order of judgment of the Supreme Court denying review of * * * a judgment of conviction." Petitioner's motion for reduction of sentence was not filed until June 28, 1971, which was 126 days after this Court's denial of his petition for a writ of certiorari, and the reduction of petitioner's fine did not occur until March 25, 1974, over three years after certiorari was denied.

Petitioner's contention that the 120-day period provided by Rule 35 runs from the date of entry of the order denying certiorari in the district court rather than the date of entry in this Court was correctly rejected by the court of appeals, which relied on the Advisory Committee Note to Rule 35 (Pet. App. 5a):

> Before the 1966 amendments to Rule 35, the Rule read in part: "The court may reduce a sentence * * * within 60 days *after receipt* of an order of the Supreme Court denying an application for a writ of certiorari." (emphasis added) The Advisory Committee Note to Amended Rule 35 states the reason for the change:
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> > If the writ were denied, the last phrase of the rule left obscure the point at which the period began to run because orders of the Supreme Court denying applications for writs are not sent to the district courts. See *Johnson* v. *United States*, 235 F.2d 459 (5th Cir. 1956) * * *. The amendment makes it clear that * * * the 120-day period

> commences to run with the entry of the order or judgment of the Supreme Court.

Petitioner's argument (Pet. 7) that the Advisory Committee Note is ambiguous because it does not specify whether "entry" refers to the district court or this Court is baseless. Since the 1966 amendments to Rule 35 were necessitated by the fact that orders denying certiorari are not uniformly transmitted to district courts, "entry" as used in the amendments manifestly refers to entry in this Court.

Petitioner's motion was therefore untimely, and the district court never obtained jurisdiction to act on his request. See *United States* v. *Mehrtens*, 494 F.2d 1172 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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